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# AGRICULTURE PRODUCTS

# AND
# ANTI-DUMPING MEASURES

# PROPOSALS FOR DISCUSSION

## MINISTRY OF INTERNATIONAL AND INTERGOVERNMENTAL RELATIONS

## GOVERNMENT OF ALBERTA, CANADA

## SEPTEMBER 2000

Alberta
INTERNATIONAL AND
INTERGOVERNMENTAL RELATIONS

# Agriculture Products and Anti-Dumping Measures
## Proposals for Discussion
## Ministry of International and Intergovernmental Relations
## Government of Alberta, Canada
## September 2000

Agricultural producers in the Province of Alberta, Canada, have had the experience of coping with anti-dumping trade actions directed at their products. The often-illogical systemic features of anti-dumping measures, particularly as applied to agricultural products, have caused producers considerable concern. In response, the Government of Alberta has considered how anti-dumping measures as applied to agricultural products could be modified to deal with the concerns.

In consultation with the firm of Arnold and Porter of Washington D.C., counsel for the Government of Alberta, a number of proposals have been developed.

These proposals cover a range of options specifically directed at the treatment of agricultural products under anti-dumping measures. They range from broad policy changes to specific changes in application of existing anti-dumping measures. These proposals are offered for consideration and discussion in the context of either or both the *Agreement on Agriculture* or the *Agreement on Implementation of Article V1 (Anti-Dumping Measures)*.

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ARNOLD & PORTER

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# *Memorandum*

**To:** Government of Alberta

**From:** Arnold & Porter

**Date:** September 13, 2000

**Re:** Agricultural Industries and Antidumping Cases

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## 1. INTRODUCTION AND BACKGROUND

Under World Trade Organization agreements, countries are permitted to impose antidumping duties as a remedy for injurious international price discrimination. For the purposes of this review of the application of antidumping measures, the antidumping measures of the United States, established by domestic legislation, are considered as a point of reference. Under U.S. antidumping law, an importing country may impose duties to offset the difference between the higher price at which merchandise is sold in the producing country (or a third-country, if not sold in the producing country in sufficient volumes) and the lower price at which the goods are sold in the United States. In an initial antidumping investigation, the U.S. Commerce Department ("Commerce") generally compares, on a product-specific basis, the weighted average U.S. price, net of all movement and selling expenses, during the period of investigation ("POI"), to the weighted average home-market/third-country price, net of all movement and selling

expenses, during the same period.[1] Generally, the period of investigation used is a one-year period ending in the calendar quarter preceding the month in which the petition is filed. (In an administrative review, Commerce compares monthly average home-market or third-country prices with each individual U.S. sale made in that month.)

The calculation of the margin of dumping also can involve use of a below-cost test. Below-cost home market/third-country sales can be excluded in calculating the home market/third-country price. This means that antidumping margins generally increase as more below-cost sales are found, since exclusion of the low price sales pushes up the average price of the remaining sales in the sample period.

In the last decade, there have been a number of U.S. antidumping investigations involving agricultural products that have served to highlight unique problems in analyzing agricultural industries and products under traditional antidumping analysis. These investigations have included not only the recent case involving Live Cattle from Canada, but also cases such as Fresh Atlantic Salmon from Chile, Fresh Atlantic Salmon from Norway, Roses from Colombia, Roses from Ecuador, and Fresh Cut Flowers from Colombia, among others.[2]

The traditional U.S. dumping investigation involves a manufactured product in an industry where there are relatively small numbers of foreign producers and competing

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[1] This description oversimplifies the adjustment methodology somewhat, but is adequate for purposes of this analysis.

[2] There also have been a number of cases concerning agricultural imports from nonmarket economies, including Crawfish from China, but these cases pose special issues pertaining to the rules governing nonmarket economy dumping and therefore are not relevant for purposes of this analysis.

U.S. producers. Each producer sells a branded or otherwise differentiated product, and often has some ability to set prices. Costs of production can be calculated easily, since the manufacturer usually uses product-specific cost accounting. Different product models can be assigned different costs because different component materials are used. Prices tend to be relatively stable, since there is little seasonality or cyclicality, and producers can react to short-term changes in demand by varying production and/or inventory. The highest dumping margins tend to be found when the home market is to some degree protected, allowing the foreign producer to charge higher prices at home, due to the absence of any ability for a third-party to engage in arbitrage.

Agricultural product industries tend to be different from manufacturing industries in important respects. This is particularly true for production of direct farm or fishery (unprocessed) agricultural products. The number of producers in the industry can be very large, and the industry can be highly fragmented, in both the producing and importing countries. The production (growing) cycle may be much longer than for a manufactured product that can be produced in a few days. Individual producers are more likely not to have control over prices, but rather are classic price takers in economic terms. Indeed, they may sell through auctions or may respond to bids by major purchasers. Even in agricultural industries where the number of producers is relatively small, a producer may, in practical terms, have little control over prices, due to the high perishability of its product and/or the inability to increase or decrease production in the short-term due to the lengthy production cycle.

Any cost of production analysis may be complicated where the producing entity is an individual or family farm. These entities typically record costs on a cash basis, rather

than using generally accepted accounting principles; they do not track costs by individual products produced; and the farmer does not pay himself or herself a salary but rather takes his or her income as the profits of the farm. Moreover, product differences, which in agricultural products tend to revolve around size or quality/grade differences, often are not susceptible to cost-based adjustments, because the producer cannot track cost differences by grade or size.

In addition, prices may be cyclical, or fluctuate greatly. For example, certain agricultural products may have historical boom and bust cycles, such as the well-recognized hog cycles and cattle cycles, where producers expand herds as prices increase and then the resulting production increase causes prices to fall, which results in herd contraction and then increasing prices. Likewise, prices may be subject to regular seasonal fluctuation, due to recurring supply or demand variations.

Agricultural products also tend to be commodities, with little or no branding or other differentiation among the products produced and sold in different countries. Indeed, labeling and other regulations may preclude producers even from identifying the country of origin to the ultimate consumer. As commodities, moreover, the products may be sold under contracts for future delivery tied to futures market prices.

These attributes of agricultural products and industries can distort the antidumping analysis, if traditional methodologies are applied without modification. For example,

- the existence of large numbers of producers creates problems for the importing country in determining whether a petition has the requisite level of industry support. Where there are hundreds or even thousands of individual

producers in the exporting country, it is difficult to ensure the selection of representative respondents and the calculation of representative dumping margins.

- The high perishability of certain agricultural products, and/or the inability to control production in the short-term, may mean that producers have no choice but to continue producing and selling their products, even under poor market conditions and declining prices, because they cannot decrease production in response to short-term price declines.
- The existence of boom and bust or seasonal pricing cycles can make it necessary for producers to sell at below-cost prices for extended periods of time during the down phase of the cycle, whereas average prices may be above cost over the entire cycle.
- Similarly, dumping margins can be exacerbated by the existence of non-cost-based value and price differences tied to grade, size or other quality attributes. The production process inevitably will result in products exhibiting different quality characteristics and commanding different prices in the market, but producers generally will incur the same average cost for producing those agricultural products. In this situation, sales of the lower grade merchandise will be found to be below-cost, and margins will be found.

The existence of futures contracts also can distort a dumping price analysis. The WTO Antidumping Agreement defines sales during the period of investigation as sales with a date of sale in the period, and it generally uses contract or invoice date as the date of sale (whenever the material terms of sale are set). Currency conversions also are made

using the exchange rate on this date of sale. But in futures sales, the date of delivery affects the price, which current antidumping law does not take into account.[3]

With respect to costs of production, cash basis accounting can lead to distortions in the calculation of cost of production, creating a mismatch between the cash costs incurred in a period and the production in that period. Similarly, it has been Commerce's practice to impute a labor expense for family labor, even where there is no actual expenditure of funds.

Issues also have arisen with respect to Commerce's allocation of financial expenses. Typically, a farm may borrow heavily to invest in land, with the loan secured by a mortgage on the property. Commerce's normal allocation methodology, however, is to allocate financial expenses to individual products in proportion to the cost of goods sold. Since land is a non-depreciable asset and is not included in the cost of goods sold, this can result in misallocation of financial expenses away from land-intensive activity (like grain farming) to less land intensive activity (like cattle).

Turning to the injury analysis in a dumping case, it frequently is difficult for foreign respondents to win agricultural cases, because the products tend to be treated as commodities that compete primarily on the basis of price. If the U.S. market share of the imported product is significant and increasing at the same time domestic U.S. prices are decreasing, an affirmative injury determination can be difficult to avoid.

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[3] The distortions are greatest in the U.S. during annual reviews, rather than in an investigation. As noted above, in investigations, POI average prices are compared, but in reviews, monthly prices are compared. For products with seasonal price fluctuations, it is highly distorting to compare, say, a May spot sale with sales contracted in May for December delivery.

## 2. NATURE OF U.S.-CANADIAN AGRICULTURAL TRADE

In evaluating potential changes to the WTO Antidumping Agreement (or the WTO Agriculture Agreement), we are also mindful of the nature of U.S.-Canadian agricultural trade. With certain exceptions, the U.S. and Canadian markets are integrated, and agricultural products move freely across the border. Given that the Canadian market is much smaller than the United States market, Canadian producers generally are price takers in the integrated market.

There is thus no reason to suspect that sustained price discrimination could exist, with Canadian producers obtaining consistently higher prices in Canada than in the United States. Rather, findings of dumping are more likely to result from the existence of below-cost sales in Canada during cyclical downturns. This circumstance highlights the unfairness of burdening Canadian producers with dumping duties in situations where economic forces beyond their control, not predatory pricing, are responsible for both the price levels in the U.S. and the general state of the North American industry.

## 3. SPECIAL AGRICULTURAL PROVISIONS IN U.S. DUMPING LAW

The present WTO Antidumping Agreement contains no special provisions regarding agricultural products or industries. The U.S. antidumping statute and regulations, on the other hand, contain several such provisions.

First, the U.S. statute contains several provisions designed to enable producers of a raw agricultural product to file an antidumping petition against imports of a processed agricultural product produced from that raw agricultural product.[4] For example, producers of grapes can claim injury, and file a dumping petition, against imports of wine, and U.S. hog farmers can file a case against imports of both live swine and fresh or frozen pork. To gain standing to bring such a case, the statute requires that the processed agricultural product be produced from the raw agricultural product in a continuous line of production, and that there be a substantial coincidence of economic interest between the producers of the raw agricultural product and the producers of the processed agricultural product.[5]

Second, the U.S. statute contains a special below-cost test for highly perishable agricultural products. Both the WTO Antidumping Agreement and the U.S. statute require the dumping margin calculation to disregard home-market/third-country sales made at less than the cost of production (i) within an extended period of time, and (ii) in

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[4] A raw agricultural product is defined as any farm or fishery product. 19 U.S.C. § 1677(4)(E)(v).

[5] 19 U.S.C. § 1677(9)(G); 19 U.S.C. § 1677(4)(E). There is also a special provision in the threat section of the statute, applicable in cases involving both a raw and processed agricultural product, permitting the ITC to find threat based on the likelihood of product shifting, if it finds current injury on one product but not the other. 19 U.S.C. § 1677(7)(F)(i)(VII).

substantial quantities.[6] Normally, Commerce uses the one-year period of investigation as the "extended period of time", and applies the below-cost test by comparing each home-market or third-country sale to the period average cost of production for that specific product. If less than 20 percent of sales by volume of that product over the period of investigation are found to be below the cost of production, Commerce does nothing and includes all such below-cost sales in calculating the weighted average home-market price. If, on the other hand, 20 percent or more of a product's sales are below the cost of production (a "substantial quantity" under the statute), Commerce excludes all such sales both in calculating the average home-market/third-country price for that product and in calculating the weighted average home market profit used for purposes of computing constructed value.[7]

For highly perishable agricultural products, however, Commerce applies a different test. It compares the period average cost of production for the product to the weighted average price for the entire period of investigation.[8] If the average price is higher than cost, i.e., on average, sales are made above the cost of production over the entire POI, Commerce does not exclude any home market sales. If, however, the weighted average cost exceeds the weighted average price, then Commerce excludes all below-cost sales. The provision can be highly beneficial to respondents, since it is less

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[6] 19 U.S.C. § 1677b(b)(1)(A); WTO AD Agmt., Art. 2.2.1.

[7] See 19 U.S.C. §§ 1677b(b), 1677b(e)(2)(A) (providing for the calculation of CV profit based on sales made "in the ordinary course of trade," which is defined so as to exclude below-cost sales that are disregarded in the calculation of home-market/third-country price, 19 U.S.C. § 1677(15)).

[8] See 19 U.S.C. § 1677b(b)(C)(ii), Statement of Administrative Action at 832.

likely than the "20% test" to result in the exclusion of low-priced home-market or third-country sales in the antidumping comparison.

The theory behind this practice is that, for a highly perishable product, a producer inevitably will have a greater number of below-cost sales than with a non-perishable product. At the end of the day, the producer must accept whatever price the market will bear, since he cannot store the product.

Commerce has generally applied this provision restrictively, determining, for example, that while fresh roses constituted a highly perishable product, fresh salmon does not. (Commerce reasoned that a salmon grower has a harvesting window of several months within which it can decide to harvest its product, and thus can control the timing of its sale.) Also, Commerce's determination is made on a "product by product" basis -- which can undercut the benefits of this provision, depending on how narrowly products are defined.

## 4. POTENTIAL PROPOSALS FOR MODIFYING THE WTO ANTIDUMPING AGREEMENT

We have grouped our suggested proposals for modifying the WTO Antidumping Agreement into three categories. First, we present an ambitious proposal for major changes in the way dumping is analyzed for cyclical agricultural industries. Second, we present more modest proposals related to the standards a petitioner must meet to file a valid antidumping case. Improved standards for filing an antidumping petition, or for setting the threshold for initiation by Commerce, are particularly beneficial, because they eliminate the uncertainty and expense associated with undergoing an antidumping investigation. Third, we present ideas for incremental modifications to the margin calculation methodology, to set clearer requirements for producers to establish dumping. The three categories discussed necessarily overlap. Thus, for example, changes in the substantive rules governing the calculation of dumping margins that tailor dumping calculations to the agricultural context, or that adjust the basis on which the ITC can find material injury, necessarily also change the threshold burden on petitioners filing a petition.

### A. Modifying the Standards for Cyclical Industry Dumping and Injury Findings

One commonly heard complaint with respect to cyclical industries (including many agricultural industries) is that a dumping case can always be brought during the downturn in the business cycle, when the domestic industry is performing poorly. This complaint was voiced in the Cattle case, for example. Canadian producers felt it was unfair that a case could be brought during the downturn in the cattle cycle, where

producers on both sides of the border may sell below their fully allocated costs of production and lose money or otherwise experience material injury.

A possible means of dealing with this situation is to require a petitioner, in a case involving a cyclical industry, to demonstrate in its petition that, during the POI, producers in the petitioning country were selling at or above the cost of production, before a case could be initiated (or at least before a below-cost investigation could be initiated against a respondent). The idea is that one should not allow dumping cases to be brought when both the domestic and foreign industries are selling below cost due to cyclical factors that are effectively beyond any individual producer's control. Alternatively, for cyclical agricultural industries, one could require that the petition demonstrate dumping over a period of time extending beyond any cyclical downturn.

These are ambitious proposals because they radically restructure current antidumping requirements. They immediately put at issue the petitioning industry's own pricing practices, which are not currently examined in deciding whether to accept a dumping petition, and/or they change other threshold burdens for filing a case. If successful, however, these proposals would stop many antidumping cases from ever being filed.

Implementing a change of this breadth would be challenging in many respects. It also would be necessary to develop a number of technical aspects of the proposal, including defining key concepts, such as what qualifies as a "cyclical" industry. Notwithstanding these issues, we believe it is useful to present this type of comprehensive approach to dealing with cyclical agricultural industries, since it clearly highlights the inequities in the current laws. Moreover, even if this comprehensive

change in treatment can only be viewed as a long term goal, in the meantime, it may be possible to identify and address some of the specific issues of greatest concern to agricultural producers shipping into export markets. For example, several of our alternative proposals below address the below-cost issue that we believe is at the heart of the problem for cyclical agricultural industries.

We also considered the cyclicality problem in the context of the ITC's injury determination. Because cyclical industries normally would be in an injured state during the down phase of the business cycle, any reasonable injury test should evaluate injury over an entire cycle, or at least take into consideration the stage of the industry's business cycle. Although the WTO Antidumping Agreement contains no special provisions in this regard, the U.S. antidumping statute as presently written, does, in fact, require the U.S. International Trade Commission to evaluate injury "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[9] The ITC thus does consider, in the case of a cyclical agricultural product, that the industry is at the downturn phase of the cycle in evaluating whether it is materially injured by reason of imports. This provision could, however, be strengthened and/or clarified by incorporating the same concept into the WTO Antidumping Agreement, and specifically requiring consideration of whether the condition of the domestic industry can be expected to improve materially as a result of cyclical factors.

Requiring the assessment of injury across the entire business cycle for cyclical agricultural industries would be another comprehensive approach to the cyclically problem. However, implementing this type of proposal would require radical revision to

current injury analysis -- a significant challenge. Agricultural cycles, such as the hog cycle or cattle cycle can be of long duration, e.g., five to ten years. While it may be feasible for the U.S. International Trade Commission ("ITC") to use publicly available data to assess imports and the performance of the U.S. industry over such a long period of time, currently the ITC's injury determination focuses on a specific point in time, i.e., the present. It must evaluate whether present imports, at the margins of dumping presently found by Commerce, are now a cause of material injury. Consideration of injury over a longer period would require a significantly different analysis. Moreover, the margin of dumping would necessarily have to play a diminished role in the ITC's decision making, since it would not be feasible for Commerce to analyze dumping over five-or ten-year periods. This, too, would require major changes to current dumping rules.

Given the kinds of issues raised by extending an injury analysis over a longer period, major structural change to the injury analysis in dumping cases may need to be pursued as a long term goal. In the interim, however, a number of other proposals could be pursued to allow a fuller and fairer assessment of the impact of cyclical factors on the condition of domestic agricultural industries. These more modest proposals, along with some proposals to change the threshold for bringing a dumping claim with respect to certain agricultural products are outlined below.

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[9] 19 U.S.C. § 1677(7)(C)(iii).

## B. Potential Amendments Pertaining To Initiation

### 1. Require a Demonstration of Industry Support from Actual Producers, Not Surrogates

In the Cattle case, both the petitioner, and Commerce in its initiation decision, gauged the level of U.S. domestic industry support by contacting various trade associations rather than producers themselves. Article 5.4 of the WTO Antidumping Agreement could be clarified to require that support must be measured from actual producers, and to preclude industry support from being measured with reference to other entities, like trade associations, farm bureaus, etc.

First, trade associations have no inherent authority to speak on behalf of their members with respect to legal action, including antidumping cases. Second, reliance upon associations rather than individual producers miscounts the level of support, since associations are counted either as fully supporting or fully opposing a petition, whereas an association's membership and/or leadership may be divided on the issue. Third, reliance upon associations can result in double counting, since individual producers can belong to multiple associations.

This type of change to the Antidumping Agreement's provisions on industry support can properly be characterized more as a clarification of the existing agreement than a modification to it. Article 5.4 of the Agreement, as written, requires an examination of whether sufficient support exists from "domestic producers." Trade associations are not domestic producers. Moreover, the paragraph explicitly deals with the issue of fragmented industries, stating that "in the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support

and opposition by using statistically valid sampling techniques." By expressly providing for the sampling of individual producers, the existing WTO Agreement implicitly does not permit an importing country to establish industry support through the use of surrogates such as trade associations.

Further, the Agreement should expressly require that the petition itself must establish a minimum level of industry support by affirmatively establishing the support of sufficient individual producers, rather than trade associations. At present, under the U.S. statute, a petitioner need only allege, rather than establish, the requisite level of industry support, and then Commerce must poll the industry. Shifting more of this burden to a petitioner increases the credibility of the petition and provides greater assurance that the affected industry actually is behind the petition before a case can be filed.

**2. Raise the De Minimis Margin Level for Agricultural Products**

Article 5.8 of the WTO Antidumping Agreement provides that the margin of dumping shall be considered to be de minimis if the margin is less than 2 percent, expressed as a percentage of the export price. The higher the de minimis level, the more difficult it is to allege dumping in a petition or to prove dumping in any investigation.

A higher de minimis level for agricultural products -- say 5.0 percent -- could be justified on several grounds. First, the cyclical nature of many agricultural industries almost inevitably leads to more below-cost sales than for manufactured products, and this translates into higher dumping margins. However, these types of below cost sales are normal and necessary, not an unfair trade practice. Raising the de minimis threshold recognizes that agriculture is different.

Second, the long production cycle for many farm products lessens a producer's ability to adjust production in the short-term to respond to price changes. Again, a higher de minimis threshold recognizes that the below-cost sales that result should not be deemed an unfair trade practice. Third, the dumping calculations for agricultural products are necessarily more imprecise than for manufactured products, given the frequent inability of producers to calculate different costs of production for different grades of a product, the general lack of sophisticated GAAP-based cost accounting systems, and the need to allocate costs imprecisely across multiple agricultural products. Raising the de minimis threshold recognizes the need to include a greater margin of error in the dumping calculations for agricultural products.

### 3. Eliminate the Below-Cost Test Entirely for Agricultural Products

As the analysis above demonstrates, below-cost sales are frequently "normal and necessary" for agricultural products, for a variety of reasons. One solution to the potential for erroneously penalizing these sales through a dumping action is not to define below-cost agricultural sales as an unfair trade practice. This can be accomplished by simply eliminating the below-cost test for certain or all agricultural products.

If this change were implemented, a petitioner would be required to demonstrate price discrimination to make a dumping claim. That is, in a U.S. case against a Canadian product, prices in Canada would have to be higher than prices in the United States to trigger potential additional duties. Given the integration of the two markets and the fact that producers generally do not engage in the more complex export transactions unless they can earn a higher return than on domestic sales, this approach would eliminate many potential agricultural dumping claims.

As suggested above, elimination of the test could be justified based both on reasons why below-cost sales are necessary in agriculture, and because meaningful cost of production data can, in any event, be difficult to obtain.

As noted above, the U.S. antidumping statute already draws a distinction between raw and processed agricultural products. Because below-cost problems generally affect raw agricultural products more than processed products, one possible approach would be to suggest such a provision only for raw agricultural products (i.e., products produced at a farm or fishery).

### 4. Raise the Threshold for Negligible Market Share

Paragraph 5.8 of the WTO Antidumping Agreement provides that the volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country accounts for less than 3 percent of the imports in the importing country, unless individual countries each accounting for less than 3 percent of imports collectively account for more than 7 percent of imports. If the market share of imports from a country is negligible, no dumping case can be filed against that country. Obviously, the higher the "negligibility" threshold, the lower the risk of a dumping case being filed. Although more study would be necessary, it is possible that a higher "negligibility" threshold would be appropriate for agriculture cases.

### 5. Lengthening the Period of Investigation for Determining Dumping

Presently, the U.S. uses a one-year period of investigation in measuring dumping. The below-cost test is applied over that one-year period, and the weighted average margin is calculated based on average U.S. prices and average home-market/third-

country prices on a product-specific basis, over that one-year period. The one-year period for measuring the volume of below cost sales generally is mandated by paragraph 2.2.1 of the WTO Antidumping Code. This provision prescribes the exclusion of below-cost sales made "within an extended period of time," and this term is expressly defined to be one year, normally, but in no case less than six months.

If the "extended period of time" were defined for raw agricultural products as a two-year period, this, in effect, would require Commerce to perform its antidumping analysis using a two-year period, since it would have to compare two years of costs to two years of sales. Lengthening the period may reduce the likelihood of below-cost investigations and findings, particularly if this change were combined with a requirement that the special below-cost test now applied in the U.S. only for highly perishable products be applied to all raw agricultural products (see proposal below).

Again, the theory would be that agricultural industries are inherently cyclical and have more extended periods of below-cost sales than manufactured products. This circumstance justifies a longer period of investigation for measuring whether truly "unfair" below-cost sales are occurring.[10]

### 6. Apply a Market Concentration Test as a Threshold Requirement for Initiating a Dumping Investigation

In the antitrust context, U.S. authorities evaluate mergers using an index designed to measure the degree of market concentration in the industry. The index is calculated

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[10] Of course, lengthening the period of investigation increases the reporting requirements and burdens on respondents, which is also a factor to be considered.

based on the market shares of the largest producers. The concept is that price competition is thwarted in an industry that becomes too concentrated.

Since the antidumping law is essentially a price discrimination statute, it can be argued that its application makes sense only in industries in which the participants have some degree of pricing power. In highly fragmented industries, each market participant is a price taker and has no pricing power. Thus, the WTO Antidumping Agreement could be modified to permit cases to be filed only where the industries in the importing and/or exporting countries have achieved certain levels of market concentration. The threshold for bringing a case presumably should remain relatively low, so that only very highly fragmented industries cannot be subject to dumping cases.

We have no specific proposal as to how the index should be calculated, what thresholds should be required, or in which markets it should be applied (both the home market and the market of the importing country, or in only one market). Issues also arise where, for example, the producing industry is large and fragmented, but the number of actual exporters is relatively small and concentrated. Indeed, in the Cattle case, while there were tens of thousands of individual ranchers and feedlots in Canada, the largest five exporters accounted for a significant percentage of total exports.

## C. Proposals Affecting the Antidumping Calculations

### 1. In Applying The Below-Cost Test, Require the Use of an "Average Cost to Average Price" Test Over the POR

Article 2.2.1 of the WTO Agreement, which provides for the exclusion of below-cost sales made within an extended period in "substantial quantities", contains two alternative tests for finding "substantial quantities." Like the U.S. statute, it provides for

a 20 percent test and a weighted average "price to cost" test.[11] In other words, below cost sales can be excluded if 20 percent or more of the goods are sold below cost, or if the weighted average cost of the products over the POR exceeds the weighted average price. However, unlike the U.S. statute, which directs that the "price to cost" test be applied only to highly perishable products, the WTO Agreement lets countries apply either test. Thus, the Article could be amended to require the application of the weighted average "price to cost" test for raw agricultural product cases.

As noted, it can be argued that below-cost sales generally are more normal and necessary for agricultural products than for manufactured products, and that the 20 percent test typically applied to manufactured products does not sufficiently recognize the greater degree of below-cost sales necessary for agricultural products. In other words, the rationale that has led Commerce to apply an alternative test for highly perishable agricultural products extends equally to other agricultural products, including those with seasonal demand and pricing fluctuations, cyclical boom and bust pricing cycles, and even simply products with a long production cycle. An agricultural producer simply cannot cease or reduce production in response to short-term price fluctuations. Production decisions are made months or years in advance, when seed is purchased, the breeding herd determined, etc. Depending on the agricultural industry, such a change could produce a significant reduction in potential antidumping claims.

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[11] Art. 2.2.1, n. 5.

### 2. Require Prices To Be Averaged at the Same Level of Specificity at Which Costs Can Be Calculated

As noted above, the dumping margins calculated by Commerce can be exaggerated in the case of agricultural products, where such products are sold and priced by grade, size, or some other differentiating factor, and the producer cannot calculate a cost difference related to this distinction. The distortion occurs when the same products are not sold in the two comparison markets. In this situation, Commerce can not calculate a cost-based difference-in-merchandise adjustment to account for the product differences, so it generally will resort to the use of constructed value. Since Commerce traditionally has calculated constructed value by looking at the cost of each individual product, and then applying an average profit margin, in practical effect, the constructed value for a product with different grades and sizes becomes the same for all grades and sizes. Inevitably, then, sales of the lower grade, or smaller product, which obtains lower prices than the higher grade or the largest sized product, are found to be dumped.

This situation could be corrected by requiring Commerce to compare average costs and prices at the same level of specificity in applying the below-cost test, and in comparing home market prices or constructed value to U.S. prices. For example, if an agricultural product were sold in three grades – low, average, and high – but each grade were produced through the same production process and thus had the same cost of production, Commerce could not compare a single weighted average cost of production for the product to the price for each individual grade. Instead, Commerce would be required to weight average the prices so that the price used matched the costs used. This would require modification of Article 2.2 of the WTO Antidumping Agreement.

### 3. Provide More Detailed Rules Governing the Calculation of Costs of Production

Calculating accurate costs of production for agricultural products can be problematic because producers may not apply generally accepted accounting principles, may not use cost-accounting or otherwise separately track costs for the different individual products it may produce, and may not include compensation for owner labor. Any changes in dumping rules to take these circumstances into account and thus lower the calculated cost of production obviously also will tend to lower the margin of dumping.

The simplest and most beneficial modification might be a clearer requirement that production costs should consist only of costs actually incurred, and cannot include imputed costs, such as for uncompensated owner labor.[12] Another suggestion would be to require that financial expenses must be reasonably allocated across different products produced, specifically recognizing that, for agricultural products, nondepreciable assets such as land are used in production and should be allocated financing costs.[13]

### 4. Permit the Inclusion of Onlv Variable Costs

Finally, as another means of addressing the cyclicality of certain agricultural products, one could require that only variable costs would be counted in determining the cost of production for agricultural products. (Interest/financing cost should be expressly defined as a fixed, not variable cost.) This proposal really is an alternative to extending

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[12] It can be argued that the current agreement permits the inclusion only of actual costs. Commerce nonetheless views the individual farmer as a separate and distinct person related to the farm, and considers the provision of labor by the farmer to the farm to be a related party transaction which it can value at market value.

the period of review or moving to the weighted average cost to weighted average price test, both of which effectively adjust for the increased necessity of below-cost sales for certain agricultural products. Switching to a variable cost test recognizes that below-cost sales are necessary in agricultural products, by recognizing that a producer may not always recover its sunk costs such as long-term interest, depreciation, and the like. However, the calculation recognizes that a producer should at least recover its variable cost within a one-year period.